

REPORT TO THE LEGISLATURE
Pursuant to P.A. 331 of 2006
Section 706(4)
County Jail Reimbursement Program
May 21, 2007

Section 706(4) of 2006 P.A. 331 indicates that the Department of Corrections shall use funds appropriated for the County Jail Reimbursement Program (CJRP) to contract for an ongoing study of legislative sentencing guidelines (SGL) and provide periodic reports on the status and findings of the study to identify and define felon or crime characteristics or sentencing guidelines scores that indicate a felon is a prison diversion. The purpose of this analysis is to determine whether the criteria for CJRP reimbursement are meeting their intended objective – that is, to reimburse counties for housing in jails those felons who otherwise would have been sentenced to prison – or whether the criteria for CJRP reimbursement could be improved.

The long-standing contractor for this ongoing study, Dr. Charles Ostrom of Michigan State University¹, had been unavailable to this periodic project for a considerable length of time, so this report is an updated determination by Dr. Ostrom of the suitability of the CJRP reimbursement formula based on data from his last published report of detailed statistics (i.e., using a large sample of 2004 data² from the report published in 2005). The contract with Dr. Ostrom was recently renewed and expenditures have been authorized under executive order as a legal mandate, so he is presently working on an expedited study of 2006 sentencing guidelines data for the other Section 706 (4) provisions regarding the sentencing patterns of statewide and local jurisdictions as well as future patterns in order to determine and quantify the population impact of the legislative sentencing guidelines on prisons and jails. A report of the findings from that study should be available by the end of May 2007.

The County Jail Reimbursement Program was established in 1989 via P.A. 324 of 1988. The program is an incentive for counties to retain locally those offenders who otherwise would be sentenced to prison. Originally part of a broader concept for a state and local partnership on criminal justice, the CJRP program was given statutory permanence in 1998, when the Code of Criminal Procedure (769.35) was amended to include language that the Department of Corrections operate CJRP and that the criteria for reimbursement be established in the annual

¹ Charles W. Ostrom, Jr., Ph.D., is a criminal justice professor at Michigan State University, who has an extensive history with Michigan's sentencing guidelines, including technical support to the Michigan Sentencing Commission in the development of the Legislative sentencing guidelines enacted in 1998, and participation in the earlier development of preceding Judicial sentencing guidelines adopted by the Michigan Supreme Court in 1988.

² Dr. Ostrom analyzed the nearly 32,000 dispositions that had sentencing guidelines data in 2004, essentially a very large sample of the 48,263 total felony court dispositions (offenders) in 2004. Similarly, the number of prison dispositions in 2004 with SGL data reported by Dr. Ostrom is 5,162, while the total prison dispositions in 2004 were 10,901. Cases are lost to the analysis for a variety of reasons, such as crimes for which SGL's are not applicable (e.g., murder 1st degree, felony firearm, and offenses that occurred before SGL enactment), and dispositions for probation violations where data entry staff either assumed that SGL's did not apply (prior to the court decisions that definitively ruled otherwise) or where technical database limitations prevented the SGL scores from being carried forward when re-sentenced. An OMNI enhancement has been implemented in 2007 to correct for this technical impediment to the goal of having complete SGL data for all applicable court dispositions.

appropriations act for the department. *Sections 706 (2) and 706 (3) of 2006 P.A. 331* provide the current reimbursement criteria and per diem amount as follows:

(2) The county jail reimbursement program shall reimburse counties for housing and custody of convicted felons if the conviction was for a crime committed on or after January 1, 1999 and 1 of the following applies:

(a) The felon's sentencing guidelines recommended range upper limit is more than 18 months, the felon's sentencing guidelines recommended range lower limit is 12 months or less, the felon's prior record variable score is 35 or more points, and the felon's sentence is not for commission of a crime in crime class G or crime class H under chapter XVII of the code of criminal procedure, 1927 PA 175, MCL 777.1 to 777.69.

(b) The felon's minimum sentencing guidelines range minimum is more than 12 months.

(3) State reimbursement under this section for prisoner housing and custody expenses per diverted offender shall be \$43.50 per diem for up to a 1-year total.

Sentencing in Michigan is indeterminate – the judge sets the minimum sentence length while the legislature sets the maximum sentence length in the statutes that define the crimes. Sentencing guidelines (SGL) were established by the legislature to provide uniformity in imposed minimum sentences across the state by accounting for characteristics of both the felon (prior record variables or PRVs) and the felony (offense variables or OV). Points for the seven PRV questions are tallied based on the felon's criminal history and are uniform across all felonies covered by the SGLs. Felonies covered by the SGLs are categorized by both statutory maximum terms in nine crime classes (e.g., 4 year terms are mostly Class F crimes) and by type of crime in six crime categories (e.g., Person Crimes.) The crime category of the felony determines which of the twenty-two OV questions should be tallied to determine the aggravating and/or mitigating characteristics of the crime.

The nine crime classes are each represented by a sentencing grid where six columns cluster the PRV scores and six, four, or three rows cluster the OV scores (depending on the crime class). Each cell of each of the class grids has a minimum sentence range that, absent a departure for a substantial and compelling reason, the judge must follow. SGL grid cell ranges are grouped as *intermediate sanction* cells (lockouts from prison), *straddle cells* (judicial discretion to sentence to prison or a local sanction within the range), or *presumptive prison* cells. The CJRP criteria reimburse counties for felons sentenced to county jail instead of prison where the SGL cells are either *straddle cells* (as long as not from the grids for Crime Classes G or H) with PRVs of 35 or more points, or *presumptive prison* cells.

The report from Dr. Ostrom, detailing the performance of the CJRP formula in ensuring true prison diversions, follows below.

May 21, 2007

TO: Michigan Department of Corrections

FR: Charles W. Ostrom, Jr., Ph.D.

RE: County Jail Reimbursement Program (CJRP) Analysis

On the basis of a thorough analysis of Michigan's sentencing guidelines (SGL) – using 32,000 cases from 2004 – I am able to reach the following conclusions concerning CJRP:

1. On the whole, the CJRP formula for county reimbursement of prison diversion cases meets the statutory goals; however, a closer look shows noteworthy areas of possible improvement, with numerous CJRP-eligible grid cells showing prison commitment rates well under 50% that are too substantial to be due to the effects of CJRP alone.

Nevertheless, after controlling for all relevant SGL factors, those offenders who meet the CJRP criteria have a statistically significant 15% higher probability of receiving a prison sentence. As an example, an individual who has committed the same crime, with the same OV level, with a similar prior record is 15% more likely to receive a prison sentence if they are CJRP eligible than if they are not. In addition, offenders who are CJRP eligible receive a sentence that is 7.5% longer than a similarly situated offender who is not eligible. Both of the previous conclusions hold even after introducing “controls” for age, sex, race, and court circuit. This suggests that those offenders who are CJRP eligible are more likely to go to prison and to do so for 7.5% longer than a similar offender who not eligible.

While these results are statistically significant, the question is whether the statistically significant difference also makes a practical difference and whether the eligibility criteria could be altered in such a way as to either increase the productivity of CJRP as a prison diversion tool or even make CJRP unnecessary. Given that the prison commitment rate for CJRP-eligible cases (Straddle Cell only—excluding the Prison cell offenders who are eligible) is currently only 36%, it is clear that many counties are being reimbursed for offenders who are not at all likely to be coming to prison.

2. To assess the CJRP eligibility criteria, it is important to take a close look at the maximum impact that CJRP could have. Under the current CJRP eligibility criteria, only offenders in Straddle Cells (and not from the Class G or Class H grids) with PRVs of 35 or more points, or Presumptive Prison cells are eligible for reimbursement. Exhibit 1 provides the 2004 offender counts for cases that have SGL scores. The shaded boxes identify those offenders who are in a Straddle Cell with the darker shading indicating those that are also CJRP eligible. As can be seen at the bottom of Exhibit 1, there were 4,998 Straddle Cell offenders who could have been part of the CJRP. In addition, there were 2,801 offenders who were in Prison Only Cells who are also eligible. This means that there were 7,799 CJRP eligible offenders.

3. Exhibit 2 presents the percentage of offenders receiving a prison sentence for each SGL grid cell. The shaded cells in Exhibit 2 highlight the Straddle Cells with the darkly shaded cells having a .400 or greater probability of prison. An examination of the shaded grid cells shows that 29 of the 45 Straddle Cells have a predicted probability of prison below .400. This means that the State is paying to keep offenders out of prison who would not have come to prison in the first place. Interestingly, the bottom right Class G grid cell (G3F) has a probability greater than .500, but the G class crimes are excluded from CJRP eligibility.
4. Exhibit 3 presents the number of 2004 offenders who received prison sentences and had SGL scores. As can be seen at the bottom of the table, only 1,802 (36%) of the 4,998 eligible Straddle Cell offenders received a prison sentence. This means that potentially 64% or more of the Straddle Cell reimbursements could be for offenders who would not come to prison in the first place.
5. The current CJRP eligibility criteria create a set of offenders with the potential for reimbursement that is quite large and consists of a diverse set of conviction offenses. Many of the offenders for whom reimbursement is sought are not the types of offenders that the program was designed to keep from prison (e.g., failure to pay child support). While the eligibility criteria are working to some degree, they could be more narrowly focused and targeted to yield a greater return on investment for the CJRP dollars expended. I believe that a more productive approach to the problem would be to rethink the current Straddle Cell situation in a way that would make CJRP either more productive or perhaps even unnecessary.

Possible changes to Sentencing Guidelines.

1. In this section, I turn my focus to all of the Straddle Cells in the sentencing guidelines, not just those that are CJRP eligible. The reason for this is that the Straddle Cell designation sends a message to the sentencing judge that the Michigan Sentencing Commission thought offenders in Straddle Cells have equally likely chances of going to prison or staying in the community.³
 - As can be seen in Exhibit 2, even with the Straddle Cell designation, the overwhelming majority of Straddle Cell offenders has less than a .500 probability of receiving a prison sentence and thus, is sentenced locally.
 - Although it is unknown, many of those Straddle Cell offenders that receive a prison sentence could be the result of judges responding to the “framer’s intent.”
 - If the Straddle Cell designation were reserved for those grid cells that truly represent a 50-50 chance of prison, then the number of Straddle Cells would be reduced.
 - Reducing the number of Straddle Cells would mean that the guidelines would no longer have a “wall” of Straddle Cells separating Lockout from Presumptive Prison

³ It is interesting to note that in the original Michigan Sentencing Commission discussions, the presumption was that Straddle Cells would identify offenders where there was a 50-50 probability of being prison bound. The thinking, at the time, was that given this equal probability, the judge could review the entire case and make a determination about whether prison was needed.

cells. Instead, an “in/out line” would exist where Straddle Cells formerly existed. Hence, to go to prison from a non-straddle “border” cell would then require a reason and a departure.

2. Straddle Cell/CJRP Facts:

- There are 45 Straddle Cells out of 258 cells across all crime class grids
- 16% of all offenders fall into CJRP eligible Straddle Cells
- Only 16 of the 45 Straddle Cells have imprisonment rates in excess of .40
- Only 45% of Straddle Cell offenders are in Straddle Cells with over a 40% chance of receiving a prison sentence.
- 55% of all CJRP eligible offenders are coming from a pool with a rather low probability of prison – raising the question of whether this is a pool that needs to be diverted.

3. Another possible approach would be to identify specific Straddle Cells that could be changed to Lockout Cells, or at least be removed from CJRP-eligibility. *(As a beginning point, I recommend removing any previously qualifying straddle cells that have an imprisonment rate less than .40).* This would leave Michigan with 16 straddle cells that more closely approximate the original intent:

- Class B – none
- Class C – none
- Class D – IE IF IIF IIID
- Class E – IF IIE IIF IIID IIIE IVD VD
- Class F – IF IIF IIIE IVD
- Class G – IIIF

The results of which are as follows:

- Straddle Cell Offenders = 2,146 (down from 4,998) – See Exhibit 4
- Straddle Cell to Prison = 1,104 (down from 1,890) – See Exhibit 5
- Straddle Cell Percent to Prison = 51% (more closely in alignment with the original idea of straddle cells)

With these changes, there would be fewer Straddle Cells (or at least fewer reimbursable cells) and hence fewer offenders who are in a grid cell where the judge can go with either local or state control. This provides a dramatic increase in predictability from my point of view—It also means that if a CJRP-type program were needed, its focus would be more direct and on those offenders who stand a more reasonable chance of actually being given a prison sentence.

4. These recommendations would require the introduction of a new concept into the Michigan sentencing guidelines – the “In/Out Line.” There would not longer be a Straddle Cell swath of grid cells separating the Lockout and Presumptive Prison grid cells in most instances. This would likely lead to a few more departures. However, there is a psychological threshold that makes it less likely judges will send an individual to prison if it requires a statement on the record that is eligible for appellate review.